APPENDIX "A"

The Law of Maritime Alluvion

The State of Texas, in the instant case, contended that under the Law of Maritime Alluvion effective in Tamaulipas at the date of the Balli Padre Island grant, accretions to the island forming after 1829 did not become the property of the owners, but inured to the benefit of the State. The Supreme Court of Texas over-ruled this contention, holding that the applicable law of Tamaulipas as to maritime alluvion was in substantial accord with the Common Law. *Its construction of the law of Tamaulipas is conclusive, as applied to land situated in Texas, and binding on other courts.*

This conclusion is well supported by the decisions of the Supreme Court of the United States, and on the basis of the ancient Roman Law.

In *County of St. Clair* v. *Lovingston*, 23 Wallace 46, 66-69; Mr. Justice SWAYNE, for the Supreme Court of the United States, said:

> "Blackstone thus lays down the rule of the common law:
>
> "'*And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining.* For *de minimis non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, *this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.* But if the alluvion be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable that he should have the soil when the water has left it dry.' 2 Com. 262; see, also, Woolwich's Law of Waters, 34; and Shultes, Aquatic Rights, 116."
>
> . . . . .

> "*In England, the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea.* King *v.* Yarborough, 3 Dow & C. App. Cas. 178."

In support of these conclusions, Mr. Justice SWAYNE said:

> "In the Institutes of Justinian, it is said: '*Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion which is added so gradually that no one can perceive how much is added at any one moment of time.*' Lib. II, tit. 1., sec. 20."

and

> "In the light of the authorities *alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous.* It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. *The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature.* It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. *The right is a natural, not a civil one.* The maxim '*qui sentit onus debet sentire commodum*' lies at its foundation. *The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.* The principle applies alike to streams that do, and to those that do not overflow their banks, and where dikes and other defences are, and where they are not, necessary to keep the water within its proper limits. 3 Wash. R. Prop. 48; Munic. No. 2 *v.* Orleans Cotton Press, 18 La. 122."

This was the rule applied universally, until after the adoption of the French Civil Code, or "Code Napoleon," in 1804. In the various countries inheriting the Roman Law, it was held:

(1) In England:

In *Rex* v. *Yarborough*, 2 Bligh, N. R. 147, 158, 160, 161; cited by Mr. Justice Swayne, the House of Lords, highest British authority, declared:

". . . We think there is a custom by which lands from which the sea is gradually and imperceptibly removed by the alluvion of soil becomes the property of the person to whose land it is attached, although it has been the *fundus maris*, and as such the property of the king. Such a custom is reasonable as regards the rights of the king, and the subjects claiming under it, beneficial to the public, and its existence is established by satisfactory legal evidence.

. . . . . .

". . . The existence of this custom is established by legal evidence. In Bracton (Book 2, cap. 2), there is this passage: *'Item quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur: est autem alluvio latens incrementum et per alluvionem adjici dicitur quod ita paulatim adjicitus quod intelligere non posses quo momento temporis adjiciatur. Si autem non sit latens incrementum, imo apparens contrarium erit.'*

"In a treatise, which is published as the work of Lord Hale [referring to De Jure Maris] treating of this passage, it is said that: 'Bracton follows in this the civil law writers, and yet, even according to this, the common law doth regularly hold between parties; but it is doubtful in case of an arm of the sea.' It is true that Bracton follows the civil law, for the passage above quoted is to be found in the same words in the Institute (Lib. 2, tit. i, s. 18), but Bracton, by inserting this passage in his book on the laws and customs of England, presents it to us as part of those laws and customs.

> Lord Hale admits, that it is the law of England in cases between subject and subject; and it would be difficult to find a reason why this same question between the Crown and a subject, should not be decided by the same rule. Bracton wrote on the law of England, and the situation that he filled, namely, that of Chief Justice, in the reign of Henry 3, gives great authority to his writings. Lord Hale, in his History of the common law (Cap. 7) says that it was much improved in the time of Bracton. This improvement was made, by incorporating much of the civil law into the common law. . . . But the authority of Bracton has been confirmed by modern writers, and by all the decided cases that are to be found in the books. The same doctrine that Bracton lays down, is to be found in Rolle's Abridgement (Tit. Prerogative, En le Mere, page 168 and seq., pl. 3, 9, 12), in Comyn's Digest (Tit. Prerogative, D. 62), in Calle's (Broderip's Edition, page 62), and in Blackstone's Commentaries (Vol. 2, page 262.)"

Later (in 1878) this question was carefully re-examined in England in the case of *Foster* v. *Wright,* 4 Common Pleas Div. 438, 446-448; where Judge LINDLEY, for the High Court of Justice, perfected the decision in *Rex* v. *Yarborough,* saying:

> "Gradual accretions of land from water belong to the owner of the land gradually added to: *Rex* v. *Yarborough* (3 B. & C. 91); and, conversely, land gradually incroached upon by water, ceases to belong to the former owner: *In Re Hull and Selby Ry. Co.* (5 M & W 327). The law on this subject is based upon the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water. The history of the law shows this to be the case. Our own law may be traced back through Blackstone, Hale, Britton, Fleta, and Bracton, to the Institutes of Justinian, from which Bracton evidently took his exposition of the subject. . . .
>
> "Upon such a question as this *I am wholly unable to see any difference between tidal and non-tidal*

or navigable or non-navigable rivers: and Lord Hale himself says *there is no difference in this respect between the sea and its arms and other waters: De Jure Maris,* p. 6. The question does not depend on any doctrine peculiar to the Royal prerogative, but on the more general reasons to which I have alluded above. . . ."

Lord HALE's *De Jure Maris,* cited in the leading English cases said:

"Second, in this case *it was by increment of time and by material thrown up by the sea.* It is not a sudden reliction or recession of the sea. . . . *It is an acquest by projection or alluvion, not by recession or reliction.*

Third. That such an acquisition lies in custom and prescription; and that it hath a reasonable intendment because these secret and gradual increases of the land adjoining *cedant sole tamquam majus principali;* and so by custom it becomes as a prerequisite to the land *as it doth in all cases of this nature by the civil law.*"

(2) IN THE UNITED STATES:

In *Banks* v. *Ogden,* 2 Wall. 57, 67; the United States Supreme Court, speaking through Mr. Justice CHASE, said:

"*The rule governing additions made to land, bounded by a river, lake or sea,* has been much discussed and variously settled by usage and by positive law. *Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions.* By some, the rule has been vindicated *on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion;* by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.

> "*There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake. . . .*"

Which was followed, chronologically, by Mr. Justice SWAYNE'S careful exposition of the Law of Alluvion in *County of St. Clair* v. *Lovingston,* 23 Wall. 46; quoted above, and by Judge GRAY'S scholarly opinion in *Shively* v. *Bowlby,* 152 U. S. 1, 35, 36; where it is said:

> "*The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters,* and to the King or the State as to private persons; *and is independent of the law governing the title in the soil covered by the water.*
>
> *Lord Hale,* in *Hargrave's Law Tracts,* 5, 14, 28; *Rex.* v. *Yarborough,* in the King's Bench, 3 B. & C. 91, and 4 D. & R. 790, and in the House of Lords, 1 Dow. & C. 178, 2 Bligh, N. R. 147, and 5 Bing. 163; *Doe* v. *East India Co.,* 10 Moore, P. C. 140; *Foster* v. *Wright,* L. R. 4 C. P. Div. 438; *Handly* v. *Anthony,* 5 Wheat. 374, 380; *Jefferies* v. *East Omaha Co.,* 134 U. S. 178, 189-193; *Nebraska* v. *Iowa,* 143 U. S. 359; *Minto* v. *Delaney,* 7 Or. 337."

Stevens v. *Arnold,* 262 U. S. 266, 270; involved title to a tract of land in Atlantic City, New Jersey, which had once been part of a lot belonging to complainant; had been lost to him by tidal erosion, and, while under water, granted to the defendant by the State of New Jersey, but which, after the issuance of the State's patent, had been physically restored by accretion, to the lot of which it had originally belonged. A New Jersey decree, undertaking to adjust this apparent conflict in titles, began by saying:

> " '. . . if the land was formerly fast land, (as this was said to have been) and the title was lost by erosion, it became the property of the State, *not merely as*

long as it remained under water, but, if the State made a riparian grant, absolutely. . . .'"

but added:

"'. . . The title lost by erosion was then lost forever, *unless it was regained by accretion, and the right of accretion was the compensation of the former owner for his loss. . . .'"*

and Mr. Justice HOLMES, in resolving this ambiguous holding, said:

". . . We presume from this language that in New Jersey *as elsewhere by the common law the right of accretion is not like the permissive right to use land still under water, but is a right as against the State as well as its grantees, when as here the grantees have not filled in the land.* In some countries that inherit the Roman law the rule may be different. *Ker & Co.* v. *Couden,* 223 U. S. 268.

We conclude that the conveyance by the State did not give the defendant a title to land added by accretion to the complainants' premises, and that it does not matter that this conveyance was by metes and bounds. *The boundaries however indicated were good until changed by the gradual work of the ocean and then were modified in accordance with what we believe to be the common law.* Banks *v.* Ogden, 2 Wall. 57."

(3) IN HOLLAND:

No other country has had more experience with maritime alluvion than has Holland; nor a commentator whose conclusions have commanded more universal respect.

Hugo Grotius, in his work on the *Jurisprudence of Holland,* Book 2, chapter 9, said:

"According to the Roman Law, acquisition of ownership by casting up of soil is either immediate or mediate. It is immediate when silt accumulates against a man's land (alluvion), or when the bed of a stream is left dry. *Accumulation of silt or alluvion was also understood to take place when the river or sea added*

something imperceptibly to the land; and what was so added belonged to the owners of the land where the alluvion occurred, each in proportion to the breadth of his land at the place."

(4) IN FRANCE:

Hall's American Law Journal, Vol. 2, pp. 307, *et seq.* (published in 1808) contains a study of the Law of Alluvion by Edward Livingston, of Louisiana, which collates the leading French authorities who had written on the Law of Alluvion in that country prior to the promulgation of the Code Napoleon in 1804. Livingston noted that Guyot, in his *Repertoire Universelle,* published in 1784, defines alluvion:

> "*Alluvion:* Increase of land which is made little by little on the borders of the *sea,* of *streams and of rivers* by lands which the water brings there. The Roman law places alluvion in the category of the means of acquiring property by the law of nations as being a species of accession; so that the accretion made imperceptibly becomes a part of the heritage to which it is found added. This is founded on the maxim which provides that the 'gain appertains to him who is exposed to suffer the damage.' "

And *Desinart,* on title Alluvion, Vol. I. p. 74, said:

> "1. Alluvion is an accretion which is made *imperceptibly, little by little, upon the borders of the sea, of streams and rivers, by lands which the water carries there.*
>
> "2. *When by alluvion an estate is imperceptibly increased, the increase belongs to the owner,* and he whose estate is decreased in this manner cannot recover what is wanting to him.
>
> "This is the maxim of the Roman law which is in effect in France except in Franche Compte."

And *LaVasle* is quoted as holding that

> "Alluvion is an increase of the ground which takes place by slow degrees, *on the shores of the sea,* on the

borders of streams and rivers; occasioned by the earth which the water conveys and which becomes so consolidated with the contiguous land that it forms a whole with it—an identity. The name of alluvion is also given to those lands which are slowly and imperceptibly left uncovered by the water.

"The Roman law places alluvions in the number of the means of acquiring according to the laws of nations, as being a kind of accession; that augmentation, being operated in a slow and imperceptible manner, remains to the inheritance, to which it is found united.

"The portion which is thus added insensibly is not considered as new land, it is a part of the old which becomes possessed of the same qualities, and it belongs to the same owner—in the same manner as the growth of a tree from parts of the tree—and is the property of the proprietor of the tree. The right of increase by alluvion is grounded in the maxim of right which bestows the profits, and the advantages of a thing, to him who is exposed to suffer its damages and its losses.

"*The alluvions which the sea produces on the land which it bathes, also belong, as a right of increase, to the proprietor of those inheritances, who may also make levees or dikes to secure them.*"

(5) In Spain:

The English Common Law of alluvion, and the Spanish rule of *Las Siete Partidas,* on the same point, derive, alike, from the Institutes of Justinian, the ancient Roman Law. Alfonso the Wise of Castile promulgated the Spanish *Partidas* at the very period (1256-1263) when Bracton was incorporating the rule as stated by Justinian, into the English Common Law.

Book 2, Title 1, Section 20, of the Institutes, cited by Bracton, and followed in *Las Siete Partidas,* provided:

"Moreover the alluvial soil added by the river to your land becomes yours by the laws of nations. Alluvion is an imperceptible increase; and that is added by alluvion which is added so gradually that no one

person can perceive how much is added at any moment of time."

This rule was carried forward into *Law 26, Title 28, Partida 3,* of *Las Siete Partidas,* which is in these terms:

> "For this reason we decree that everything that rivers take from men little by little so that the amount of it cannot be ascertained because it is not all removed at once shall belong to the owners of the land to which **it is united."**

Since the rule of the English Common Law, and the Spanish rule of *Las Siete Partidas* both follow the quoted rule from Justinian; which mentions rivers, only, and does not refer, in terms, to accretions cast up by the sea; the only question that has arisen, or can arise, in this connection, is whether under the Spanish law, maritime accretions, like the alluvion of rivers, became, as under the Common Law, the property of the adjacent owner; when the identical rule from Justinian was applied to seashore grants in Spain.

Since there has never been, in Spain, or in the Spanish provinces in America, a body of judicial precedents, interpreting the law and recording its growth; there is, in Spanish jurisprudence, no background of adjudications to aid with difficult interpretations; and the only authorities available with regard to them are the opinions of learned law writers, called *juris consults,* whose conclusions and commentaries have been preserved. Most notable of these, and the one invariably followed by the Supreme Court of Texas, was Dr. Joaquin Escriche, who, in his *Diccionario de Legislacion y Jurisprudencia,* at p. 149, word *Alluvion,* said:

> *"The alluvium that the sea adds to properties situated on its shores, belongs also by the right of accession to the owners of said property, who are authorized to construct dikes in order to preserve it."*

No Spanish authority is known and, for that matter, none is known from any jurisdiction, expressing a contrary view, which does not derive, directly, or by intermediate statute,

from a radical departure from the rule of Justinian stemming from the "Code Napoleon," or French Civil Code. This was the first true code adopted anywhere; and it has profoundly influenced the legal systems of Spain, Italy, Holland, Mexico, and the States of Central and South America; and that of Louisiana, of the United States. These all tend to follow the Code Napoleon, where it departs from the Roman Law. On the point at issue, Section 556 of the French Civil Code provides:

> "The accumulation and increase of deposits formed successively and imperceptibly on soil bordering on a river or other stream is denominated alluvion, and that alluvion belongs to the proprietor of the bank."

and Section 557:

> "It is the same with relictions which running water forms when it retires insensibly from one of its banks and moves against the other. The proprietor of the bank that is uncovered profits by the alluvion, without the riparian owner on the opposite side being able to claim the land which he has lost. *This right has no place in regard to relictions of the sea.*"

This is the earliest known enunciation in any law, and the earliest statement of any rule, that the law of seashore alluvion differs from Justinian's rule as to alluvion of rivers, which is still applied in France. It represented a complete reversal of the law theretofore in effect in France; and sheds no light, of course, on the Spanish Law in effect in the Mexican State of Tamaulipas in 1829.

Notwithstanding the evident influence of the Code Napoleon on later codes of the Latin states, it was not invariably given effect. Thus, as regards Maritime Alluvion, Article 454 of the Italian Code, adopted in 1865, as translated into English, provides:

> "Art. 454.—The lands abandoned by the rivers belong, also by alluvion, to the owner of the uncovered shore, and the owner of the opposite shore has no claim to the land lost. This right does not apply as to land abandoned by the sea."

This is a literal translation of Article 557 of the French Civil Code. So is Article 510 of the Louisiana Civil Code. But Article 650 of the Civil Code of Chile, far from declaring maritime alluvion to be public property, is in close accord with our British and American common law rules. With Section 649, essential to its meaning, it translates:

> "Sec. 649.—The augment which the shore of the sea, or of a river or lake, receives from the slow and imperceptible withdrawal of the waters, is called alluvion.
>
> "Sec. 650.—The land of alluvion accedes to the riparian estates between their respective boundary lines prolonged directly to the water; but it will belong to the State in improved ports.
>
> "The land which the water covers and uncovers alternately in its periodical rise and fall, forms part of the shore or of the drainway, and does not accede to the contiguous estates so long as this condition continues."

The first civil code of the Mexican State of Tamaulipas was adopted in 1871. It is, in substance, the same code that was enacted by the Federal Government of Mexico, December 13, 1870, for the government of the Federal District of Mexico and the Territory of Lower California, under federal laws. On the point here considered, it was no more than a re-statement, in modern Spanish, of the archaic language of *Las Siete Partidas.* As translated by Hon. J. T. Canales (of Respondents' Counsel) the Tamaulipas Code of 1871, Title III, Chapter 6, dealing with the Right of Accession, provides:

> "Art. 893: To the owners of estates bounded by the banks of rivers belong the increase which these estates receive slowly and insensibly by the effect of the current waters.
>
> "Art. 894: The owners of estates bounded by lakes or ponds do not acquire the land uncovered by the natural diminution of the waters, nor lose that which is inundated by extraordinary flows.

"Art. 895: When the force of the river washes away a considerable and recognizable portion of riparian land and carries it towards another below, or to the opposite bank, the proprietor of the portion torn away may reclaim the property, doing so within two years, counting from the event, this term having passed, he will lose his right of ownership, unless the proprietor of the field to which the washed-away portion was united shall not have taken possession of the same.

"Art. 896: If the force of the water washes away trees only, the proprietor of them preserves the right of reclaiming them and of carrying them to his estate in the same period of two years, but he cannot use the rights of proprietor of them in the field of another on which they are found.

"Art. 897: When a river varies its course, the owners of the land, or estates newly covered with the waters, lose the space which the river occupies; and the riparian proprietor of the abandoned bed acquires the part which remains in front of his land to the middle of the bed or course of the river."

Two American decisions, and only two, are cited as holding that the rule of the Code Napoleon, was also the rule of the ancient Spanish law. These are:

Zeller v. *Southern Yacht Club,* 34 L. Ann. 837; by the Supreme Court of Louisiana; and *Ker* v. *Couden,* 223 U. S. 268, 279; by the Supreme Court of the United States. Both are cases construing statutes derived directly, or intermediately, from the French Civil Code.

As was pointed out by the Supreme Court of California in *Strand Improvement Co.* v. *City of Long Beach,* 173 Cal. 765, 770-773; the Louisiana opinion is not clear as to whether the land there in question was upland formed by accretion, or was land underlying the waters of Lake Pontchartrain, which had not risen above the level of tidal flow. In so far as it does relate to accretions, it applies the provisions of Article 510, of the Civil Code of Louisiana; transplanted, directly, from the Code Napoleon of 1804.

Ker v. *Couden, supra,* arose in the Philippine Islands, and, as was carefully stated by Mr. Justice HOLMES in his opinion, dealt only with

> ". . . the *law of the Philippines,* not with that which prevails in this country, *whether of mixed antecedents or the common law.*"

It was limited, in fact, to a local application of the Spanish Law of Waters of 1866. The land involved in that suit contained the United States Naval Base at Cavite; which had long been in the use and possession of the United States Government, and included improvements costing half a million dollars, which our Government had made. Prior to its acquisition by the United States, it had been similarly long used and occupied by the Government of Spain. The issues were so framed that the courts could not render judgment for the Government on its possessory title; and the law of alluvion had to be so applied as to arrive at the undoubted justice of the case. Each of the three courts which heard the case so applied it; but they gave very different reasons for the results reached.

The opinions of the two Philippine courts (the Court of First Instance of Cavite Province, and the Supreme Court of the Philippine Islands, *Ker* v. *Couden,* 6 Phil. R. 732) present, when carefully studied, an interesting history of the change in the rule as to Maritime Alluvion, in Spanish jurisprudence, under the influence of the Code Napoleon, after 1804.

Beginnings of a departure from the ancient rule of *Las Siete Partidas,* as interpreted by Escriche, toward the doctrine of the Code Napoleon, appear in 1849 in a comment by Arrazola:

> (*Enciclopedia Española, Derecho y Administracion,* Madrid, 1849, Volume 2, pp. 580-583;)

who said:

> "Nor does there exist any right of accretion with respect to the changes made by the sea which leave above water mark any piece of land adjoining the fields

> or the beach. *The French law has thought it proper to expressly decide this point in the manner above stated,* but it should be sufficient to remember that these lands are considered as appertaining to the public domain in order to so determine in all cases, even if there should be no final decision to that effect."

Arrazola's reference to the French law indicates that the writer knew no Spanish precedent; and proposed, or anticipated a Spanish application of the rule newly created by the French Code. It appears from the decisions of the Philippine courts in *Ker* v. *Couden, supra,* that the commission appointed to draft the Spanish Law of Waters of 1866, recommended: (Article 7, Commission's Report)

> "*That lands adjacent to the sea or to its shores should be entitled to profit by the rights of alluvion,* on the ground that the reasons of justice and convenience, upon which is based the right of alluvion granted to the owners of shore lands, are equally applicable to the case under discussion."

This would have continued in effect Escriche's understanding of the rule of the ancient law. But Article 4 of the Law of Waters of 1866, as actually adopted, modified this recommendation, in the direction of the rule of the Code Napoleon, since the new Spanish statute read:

> "Art. 4. Lands which attach themselves to the shores by accessions and deposits caused by the sea are of the public dominion. When the waters of the sea no longer bathe them and they are not necessary for purposes of public utility, nor for the establishment of special industries, nor of the service of the coast guard, *the Government will declare them the property of the owners of the adjacent estates in augmentation of these.*"

This was the statute construed in *Ker* v. *Couden, supra,* by Mr. Justice Holmes. His caution in citing it in his later opinion in *Stevens* v. *Arnold, supra,* and his strict limitation of his *Ker* v. *Couden* opinion to Philippine local law, are

conclusive that it could not apply, and that its author did not intend that it should apply, where the Spanish Law of Waters was not in the case.

> *State* v. *Texas Land & Cattle Co.*, 34 Tex. Civ. App. 460, 463;

was, until the publication of the Texas courts' opinions in the instant case, the only published opinion in a case affecting lands granted by the Mexican State of Tamaulipas, decided by any court of Texas or of the United States, which bore upon the exact question here. It was a suit by the State of Texas to recover *Los Laureles*, an unconfirmed Spanish grant situated on the shores of *Laguna Madre*, in Nueces County, Texas, opposite the northern end of Padre Island. It was granted for twelve leagues in 1807, but, as resurveyed in 1872, contained twenty-two. This excess was created, as was that of Padre Island, partly by accretion, and partly by the inclusion of more leagues than stated in the original grant. For this excess, by alternative plea, the State sued. In that case, as in this, recovery was denied by the Texas Court.

In answer to one of the State's contentions, that court said:

> "It is further contended by the State that it was entitled to recover the land built up on the eastern side of said peninsula since the date of the grant, because the extension had not been so gradual as to make it an accretion which would belong to the owner of the adjoining land. The law applicable to this question has been fully stated by this court in the case of *Denny* v. *Cotton*, 3 Tex. Civ. App., 634; and, applying the rules there laid down to the facts in the case, we think it clear that the lower court was authorized in concluding that such extension of the land as was shown belonged as an accretion to the adjoining owner."

Denny v. *Cotton*, 3 Tex. Civ. App. 634; cited in the Texas court's opinion, was based upon the opinion of the Supreme Court of the United States in *Nebraska* v. *Iowa*, 143 U. S. 359. These cases dealt with the alluvion of rivers; and

their application to maritime alluvion in the Laureles case, is conclusive that the political authorities of Texas, as well as the courts, were convinced that the laws applicable to Spanish law grants and to seashore alluvion, were those which are applied to alluvial erosion and accretion, in Texas and throughout the United States.

The opinion of the Supreme Court of California, in *Strand Improvement Co.* v. *City of Long Beach, supra,* is of special interest in that it construed, in the light of that State's adoption of the common law, a California statute defining accretion, identical in substance, and almost so in verbiage, with the provisions of Law 26, Title 28, Partida 3; and Section 20, Book 2, Title 1, of the Institutes of Justinian, which declare, respectively, the law of alluvion in Spanish jurisprudence, and in that of Rome. The California court said:

> "The claim of the city to such accretions is based entirely on the proposition that the *law of this state is that land formed by alluvion along the shore of the sea does not belong to the owner of the adjoining upland, but remains the property of the state in virtue of its sovereignty,* as it was while the tides flowed over the space covered by the alluvion. The proposition considered in the light of its practical application and consequences, is certainly a most extraordinary one. California has more than 1,000 miles of seashore to which land is continually being added by alluvion, and from which land is continually being taken away by reliction. The actual line of mean high tide, as it existed when the State was formed, or as it was in 1872, when the Civil Code was enacted, has never been surveyed, and in places where relictions or alluvions have changed the shore line, the original line is unknown and cannot be ascertained with any degree of certainty. *If the doctrine is correct, the state is the real owner of innumerable parcels of land added to the shore by alluvion which hitherto have been supposed to belong to the respective owners of the upland to which they have been added* and the boundaries of which cannot now

be ascertained. *It is not difficult to see that great uncertainty, confusion, and much litigation would ensue if such doctrine were established and enforced.*

* * * * *

"The city relies on the application of the maxim, 'expressio unius exclusio est alterius,' to Section 1014 of the Civil Code. This section is as follows: 'Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.'

"*The argument is that since this section mentions the banks of a 'river or stream', and does not mention the seashore, it must be taken as abrogating the common law, so far as alluvion upon the seashore is concerned.* This theory would make an omission to say anything on a subject operate as an affirmative declaration repealing an existing law on the subject not mentioned. We do not think the rule of construction relied on should be carried so far in this case, if, indeed, it could be done in any case. The doctrine that the right to alluvion exists in the owner of the seashore, as well as elsewhere, has been recognized in our decisions. Dana *v.* Jackson, St. W. Co., 31 Cal. 118, 120, 89 Am. Dec. 164; Wright *v.* Seymour, 69 Cal. 122, 126, 10 Pac. 323. * * *

"Our conclusion is that the right of the upland owner to additions to his land by alluvion or accretions exists where the land abuts upon the ocean, and that Section 1014 of the Civil Code has no application to alter the common-law rule in that respect."

Directly on the Law of Maritime Alluvion, the California court said:

"* * * *The Act of April 13, 1850, declared that the common law of England shall be the rule of decision in this state, where it is not repugnant to the federal or state constitution, or to the statutes of the state.*

(Stats. 1850, c. 95, p. 219.) This provision is now a part of our Political Code. (Section 4468.) The law of alluvion is thus stated by Blackstone: '*And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For de minimus non curat lex; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss.*' (2 Bl. Com, 262.) This is practically the universal rule. (3 Wash. Real Pro. (6th Ed.) Sec. 1884, p. 74; 1 Am. & Eng. Ency. of Law, 468; Camden, etc. Co. *v.* Lippincott, 45 N. J. Law, 405, 410; Mulry *v.* Norton, 100 N. Y. 424, 434, 3 N. E. 581, 53 Am. Rep. 206; Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331, 344, 14 S. Ct. 548; St. Clair County v. Lovingston, 90 U. S. (23 Wall.) 46, 57, 23 L. Ed. 59; Hagan *v.* Campbell, note, 33 Am. Dec. 277.) There is a statement of Chancellor Kent that land gained by accretion belongs, 'in the case of the sea or navigable rivers, to the sovereign, (3 Kent, Com. 428.) This is part of a passage defining the law of accretion. It is directly contrary to the cases cited by the author to support it. In a footnote to the fourteenth edition, Mr. Gould, the annotator, cites Zeller *v.* Southern Yacht Club, 34 La. Ann. 837, as sustaining the doctrine. The opinion in that case is not clear on the question whether the land in controversy was upland made by accretion, or was land under the waters of Lake Pontchartrain. *So far as it refers to the right to accretions, it appears to be based on the authority of article 510 of the Louisiana Civil Code,* which it gives as declaring that the right of the upland owner to land left dry by derelictions 'does not take place in case of derelictions of the sea.' *That state has not, so far as we are aware, adopted the common law. The case is, therefore, not in point here. It is contrary to all common-law authority.*''

The applicable law has never been better stated than by Mr. Justice McKenna, dissenting in *Ker* v. *Couden, supra,* in preserving and stating the general rule:

> "* * * I think the better deduction from them (the authorities cited) is that they only declare *the constant integrity of the shore, and the dominion of the government over it whether it recede or advance. When it ceases to be washed by the tides or the seas it becomes part of the upland, and belongs to the owner of the upland.* And this is but the application of the principle, said to be of natural justice, that *he who loses by the encroachments of the sea should gain by its recession.* Banks *vs.* Ogden, 2 Wall. 57, 67."

APPENDIX "B"

State's Claim of Forfeiture under Section 8, Article XIV, Texas Constitution of 1876

Petitioner's most urgent contention has been that the Padre Island grant, though valid, and explicitly confirmed by the Legislature of Texas in 1852, is nevertheless forfeit to the State by reason of the failure of its owners to have it surveyed, and field notes filed in the General Land Office of Texas, prior to January 1, 1880, in accordance with a provision of Section 8, Article XIV, of the Texas Constitution of 1876. Both the Texas Supreme Court, and the Court of Civil Appeals have been most patient with Petitioner in passing upon and over-ruling this argument. In this suit, an action to try title, this contention was but vaguely before the court: (Petitioner's Application and Brief, pp. 9, 60-75)

(1) *It is the established law of Texas that no forfeiture can be had, nor can the State resume the grant, or otherwise appropriate land once granted, until a forfeiture has been decreed after judicial inquiry under and according to an Act of the Legislature specifically providing for such forfeiture, and for such inquiry, and for divesting the title of the Grantee:*

Section 1, Article XIII, Constitution of Texas, 1876; Hamilton v. *Brown,* 161 U. S. 256; *Jones* v. *McMasters,* 20 How. (U. S.) 8; *Airhart* v. *Massieu,* 98 U. S. 491; *Caplen* v. *Compton,* 5 Tex. Civ. App. 410; *Wiederanders* v. *State,* 64 Tex. 133; *Hanrick* v. *Hanrick,* 54 Tex. 101; *Sabriego* v. *White,* 30 Tex. 576; *Howard* v. *Colquhoun,* 28 Tex. 134; *Luter* v. *Mayfield,* 26 Tex. 325; *Barclay* v. *Cameron,* 25 Tex. 232; *Bowmer* v. *Hicks,* 22 Tex. 155; *Johnston* v. *Smith,* 21 Tex. 722; *Rivers* v. *Foote,* 11 Tex. 662; *Russell* v. *Randolph,* 11 Tex. 460; *Hancock* v. *McKinney,* 7 Tex. 384; *Swift* v. *Herrera,* 9 Tex. 263.

(2) The weakness of Petitioner's position is further illustrated by applying its contentions here to the Tamauli-

pas grant called *Rincon del Oso;* construed by the highest courts of Texas in

Schaeffer v. *Berry,* 62 Tex. 705, 713; and
Land v. *Dunn,* 241 S. W. 580;

on which, as appears from the maps published with the opinion in *Schaeffer* v. *Berry, supra,* and the maps of Nueces County here in evidence, the City of Corpus Christi stands.

Every attack now made, or which has ever been made, upon the Padre Island title (other than such as are implied from non-production of the "final concession," as explained above) applies, equally, to *Rincon del Oso.*

A principal ground of attack on the Padre Island title was that it is a grant of land within ten leagues of the seashore for the making of which previous approbation of the Supreme Mexican executive was not shown. Examination of the Villareal title to *Rincon del Oso,* as published in the cited cases, shows that that objection, if tenable, would apply with equal vigor to that grant.

It was urged against the title to Padre Island, that it was a grant to two individuals of more than five leagues each. *Rincon del Oso* was, on its face, a grant of ten leagues to a single grantee.

It is argued that the Relinquishment Act of 1852, did not take effect as to Padre Island, because of a general exception as to islands. *Rincon del Oso,* though more largely on the mainland, was, also, in part, an island grant.

It is urged, most vigorously, against the Padre Island title, that it was a grant of more leagues than stated, nominally, in the grant. The whole occasion for the plenteous litigation which has affected *Rincon del Oso* (in the cases collated in the opinion in *Land* v. *Dunn*) has been that when its description is applied on the ground, it contains, on any construction of its callings, much more than the ten leagues that its title nominally recites.

Finally, Petitioner argues here, notwithstanding the conclusive efforts of the Texas courts to put it right, that Padre Island is a forfeited title because its owners did not "com-

plete their surveys and the plots thereof," and "return their field notes to the General Land Office," prior to January 1st, 1880, in accordance with a provision of Section 8, Article XIV, of the Constitution of Texas, directing that that be done. The Supreme Court of Texas, in *Schaeffer* v. *Berry, supra,* declared, with reference to *Rincon del Oso,* that

> *"There is no evidence that the owners of the Villareal title have ever complied with the requirements of a survey and return of field notes to the land office, in the confirmation act of August 15, 1870, or with the provisions of the constitution of the state on the same subject."*

It was in proof here that *Rincon del Oso* was one of the grants confirmed by the Act of February 10, 1852 (Confirmation No. 20 for Nueces County). The Attorney General's claim of forfeiture as against Padre Island, applied to *Rincon del Oso,* would render moot the decision of the Supreme Court in *Schaeffer* v. *Berry, supra;* and the opinions of the Texas Courts of Civil Appeals in the many cases decided by them (as listed in the opinion in *Land* v. *Dunn, supra*), involving *Rincon del Oso,* would be in no better case.

And if the Attorney General of Texas believes that Padre Island is a forfeited grant for the reason argued; he must also believe that *Rincon del Oso* is likewise forfeited; and that the vast properties and values which constitute the city of Corpus Christi, together with its homes, factories, wharves and docks, and massive buildings, as well as its immensely valuable adjacent oil fields, all located on *Rincon del Oso,* belong of right, under the Constitution of Texas, to the Public Free School Fund of Texas; and that it is his sworn duty, under the Texas Constitution, to sue for them as such. And he is also in the extraordinary position of having been, for the past five years, suing for barren Padre Island, while the valuable *Rincon del Oso* oil fields, equally the State's property, have been drained of oil, and robbed of their mineral value, without his intervention in behalf of the State.

The same laws and the same constitution which measure Respondents' title to Padre Island, apply, equally, to *Rincon del Oso;* and that great injustice would be done to thousands of citizens by suing to recover *Rincon del Oso,* does not alter the Constitution, or repeal the law.

There is, of course, no ground for forfeiting *Rincon del Oso;* but that is true of the Padre Island title as well; and the Attorney General's argument for forfeiting Padre Island belongs with those dismissed by Mr. Justice Bradley in *Gonzales* v. *Ross,* 120 U. S. 605; as "too frivolous to deserve serious attention."